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No. 87-2039

Supreme Court, U.S.

FILED

SEP 12 1988

JOSEPH E. SPANIOL, JR.  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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GEORGE FAHMY, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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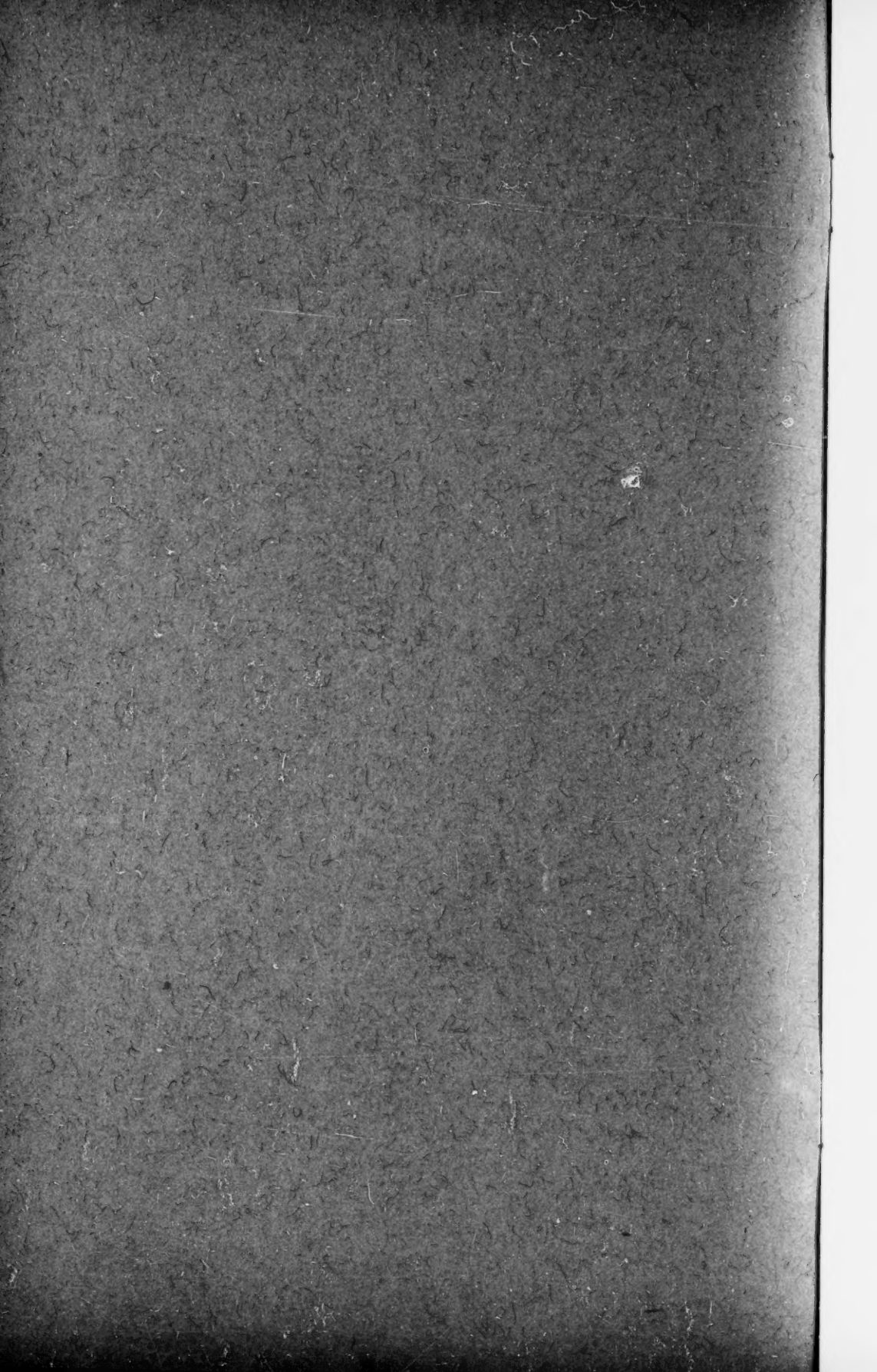
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## QUESTIONS PRESENTED

1. Whether the evidence at trial was sufficient to show that petitioner, a broker at a securities firm, conspired to defraud the United States, in violation of 18 U.S.C. 371, by causing his employer not to file currency transaction reports on deposits of currency involving transactions of more than \$10,000, in violation of 31 U.S.C. (& Supp. III) 5313(a) and 5322, and by causing his employer to fail to make and keep accurate records of its cash receipts, in violation of 15 U.S.C. (& Supp. III) 78q(a) and 78ff.

2. Whether the district court abused its discretion under Fed. R. Crim. P. 23(b) by allowing an 11 person jury to return the verdict after excusing a juror who became ill after jury deliberations had begun.

3. Whether the evidence was sufficient to show that petitioner obstructed justice, in violation of 18 U.S.C. 1503, by obstructing grand jury proceedings.

4. Whether the district court erred by denying petitioner's requested instruction on specific intent.



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## **OPINION BELOW**

The opinion of the court of appeals (Pet. App. 14a-19a) is not reported.

## **JURISDICTION**

The judgment of the court of appeals was entered on April 12, 1988. The petition for a writ of certiorari was filed on June 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to defraud the United States in violation of 18 U.S.C. 371, and of obstruction of justice in violation of 18 U.S.C. 1503. He was sentenced to five

years' probation and ordered to perform 100 hours of community service.<sup>1</sup> The court of appeals affirmed in an unpublished opinion (Pet. App. 14a-19a).

1. The evidence at trial showed that petitioner, who was a securities broker with Paine Webber, assisted a co-worker, Gary Eder, in causing Paine Webber to evade federal currency transaction reporting requirements (see Pet. App. 14a-16a). Under federal law, a financial institution must file a currency transaction report (CTR) whenever a customer deposits currency with the institution in excess of \$10,000 (see 31 U.S.C. (& Supp. III) 5313; 31 C.F.R. 103.22(a)(1)). Petitioner aided Eder in splitting large cash deposits of some of Eder's clients into multiple deposits of less than \$10,000 each so that CTRs would not be filed. In particular, petitioner requested that Paine Webber cashiers advise him whenever a customer of Eder sought to deposit cash in excess of \$10,000 and, on at least one occasion, petitioner told Eder that he had withheld money from a deposit in order to avoid triggering the currency transaction reporting requirement (Pet. App. 16a). Petitioner also assisted Eder in listing large cash receipts as checks and, to that end, regularly requested Paine Webber cashiers to miscode customer receipt records (*ibid.*). After learning that a grand jury was investigating several individuals who had deposited large sums of cash with Paine Webber and that one of the individuals concerned had pleaded guilty, petitioner and Eder agreed to destroy Paine Webber miscoded cash receipt reports and they re-

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<sup>1</sup> The jury acquitted petitioner's codefendant, Joseph Tota, on both counts. A coworker of petitioner, Gary Eder, who was named in the indictment as a coconspirator, pleaded guilty to one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and to one count of willfully causing his employer to fail to maintain certain financial records, in violation of 15 U.S.C. 78q(a) (Pet. App. 1a-2a).



moved a shopping cart of the documents from its offices (*id.* at 17a).

After jury deliberations had begun, a juror reported to the court that he could not attend the deliberations that day due to illness. The court denied petitioner's proposal that the deliberations be delayed for five days. The court instead excused the juror and allowed the remaining jurors to continue their deliberations and to return a verdict. Pet. App. 18a.

2. The court of appeals affirmed petitioner's convictions on both counts (Pet. App. 14a-19a). Relying on its prior decision in *United States v. Nersesian*, 824 F.2d 1294, 1310 (2d Cir. (1987)), cert. denied, No. 87-5681 (Nov. 16, 1987), the court held that "the willful structuring of cash transactions by the employees or customers of a financial institution in order to avoid the filing of cash transaction reports constitutes a violation of 31 U.S.C. § 5313" and that "an agreement to cause the financial institution to fail to file such reports may be punished as a conspiracy to defraud the United States" (Pet. App. 15a (citations omitted)). The court rejected petitioner's claim that the statute failed to provide adequate notice of its application to employees and "that no violation could have been caused by his miscoding of cash receipts as check receipts because the applicable statute and regulations do not require brokers to differentiate between cash [receipts] and checks" (*ibid.*). The court ruled (*id.* at 16a) that "the false representation of cash receipts as check receipts violates the Securities Exchange Act," whether or not federal law otherwise mandates differentiation between cash and checks. Finally, the court concluded that the evidence was "more than adequate" to persuade a jury that an unlawful conspiracy had transpired (*ibid.*).

The court likewise upheld petitioner's conviction for obstruction of justice, concluding that the evidence was sufficient to show that petitioner and Eder "agreed to destroy evidence with knowledge that the evidence was

pertinent to an ongoing investigation" (Pet. App. 16a-17a). The court rejected petitioner's claim that the district court failed properly to instruct the jury on the intent element of that offense (*id.* at 17a-18a). The trial court's instruction, the court of appeals explained (*id.* at 18a), was sufficient because it "clearly informed the jury of the need to find an intentional obstruction of justice." Finally, the court concluded that the district court had not abused its discretion in deciding to excuse a juror who became ill after the jury had begun deliberations and to allow the remaining jurors to return a verdict, rather than adjourning deliberations for five days (*ibid.*).

### ARGUMENT

1. Petitioner contends (Pet. 8-13) that this Court should review his conspiracy conviction in order to consider the court of appeals' underlying ruling that it is illegal to structure currency transactions so as to avoid the currency reporting requirement. This Court has recently denied certiorari in a host of other cases raising the same issue and should do so here. See *Pavlico v. United States*, No. 87-6491 (May 31, 1988); *Lafaurie v. United States*, No. 87-1493 (May 31, 1988); *Perimutter v. United States*, No. 87-1053 (Mar. 7, 1988); *Florez v. United States*, No. 87-810 (Feb. 22, 1988); *Giancola v. United States*, No. 86-491 (Dec. 15, 1986); *Heyman v. United States*, No. 86-5365 (Dec. 1, 1986). As we most recently explained in our brief in opposition in *Lafaurie*, there is a division of authority in the courts of appeals on this and related issues, but further review is not warranted because of superseding federal legislation.<sup>2</sup> The Money Laundering Control Act of 1986, which is included as Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100

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<sup>2</sup> A copy of our brief in *Lafaurie* is being provided to petitioner along with this brief.

Stat. 3207-18, was expressly designed to overrule those cases that conflict with the result reached by the court of appeals here. The new law therefore deprives the statutory issue presented in the petition of any continuing importance. In any event, as we also showed in our brief in *Lafaurie*, the court of appeals' decision is correct under the law as it existed prior to the enactment of the Money Laundering Control Act. For these reasons, petitioner's claim that his restructuring activities fall outside the purview of 31 U.S.C. (& Supp. III) 5313, and the regulations promulgated thereunder, does not warrant further review by this Court.

2. Further review of petitioner's conspiracy conviction is also not warranted to consider petitioner's claim (Pet. 12-13) that the evidence does not show that customer receipt records were miscoded. The evidence showed that petitioner "regularly instructed Paine Webber cashiers to miscode the customer receipt records and engaged with Eder in several concerted attempts to cover up the miscoding when it came to the attention of Paine Webber" (Pet. App. 16a). Nor, contrary to petitioner's assertion (Pet. 19-20), did the district court act improperly in instructing the jury that petitioner's culpability does not turn on whether federal law required Paine Webber " 'to distinguish in its records between cash payments by customers and check payments by customers' " (*id.* at 19). As the court of appeals concluded (Pet. App. 15a-16a), "[w]hether or not the obligation to keep records as to 'all receipts and disbursements of cash and all other debits and credits,' 17 C.F.R. § 240.17a-3, mandates differentiation between cash and checks, the false representation of cash receipts as check receipts violates the Securities Exchange Act."

3. The court of appeals also correctly rejected petitioner's contention (Pet. 13-16) that the district court erred by permitting the verdict to be returned by an 11 person

jury after excusing a juror who became ill after deliberations had begun. Fed. R. Crim. P. 23(b) specifically authorizes a district court "to excuse a juror for just cause after the jury has retired to consider its verdict" and further provides that "in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." As the court of appeals concluded (Pet. App. 18a), the district judge "acted well within his discretion" in this case. "[I]t was unclear whether the ill juror would ever be able to return" and "[t]he [petitioner's] proposed five-day adjournment would have risked dulling the remaining jurors' recollections of trial, particularly since there had already been a three-day delay between the summations and the charge" (*ibid.*).

4. Nor is further review warranted of petitioner's fact-bound claim (Pet. 16-17) that his conviction for obstructing justice should be overturned because the government presented insufficient evidence that he knew that the documents that he destroyed were being investigated by the grand jury. As the court of appeals explained (Pet. App. 17), the evidence was plainly sufficient for the jury to infer that petitioner knew that the documents that he destroyed were sought by the grand jury during its investigation. Petitioner knew that the grand jury had issued subpoenas for documents relating to the accounts of some of Paine Webber's large depositors; he discussed with other employees the guilty plea of one of the individuals who had deposited large amounts of cash with Paine Webber; and he told Eder just before they agreed to destroy the documents, that the investigation was "heat[ing] up." *Ibid.*<sup>3</sup>

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<sup>3</sup> Petitioner's reliance (Pet. 17) on *United States v. Williams*, 470 F.2d 1339 (8th Cir.), cert. denied, 411 U.S. 936 (1973), is misplaced. The defendant in that case assaulted a federal agent whom he had just

5. Finally, there is likewise no merit to petitioner's contention (Pet. 17-20) that the district court erred by denying his requested jury instruction on specific intent in the court's obstruction of justice charge. Petitioner acknowledges (Pet. 18) that "[d]uring the course of its charge, [the district court] did instruct the jury on the need to find specific intent," but complains that the district court failed to adopt petitioner's proposed charge to the jury on that element "when it came time to instruct with regard to the intent requirement."

A district court, however, need provide the jury only with "an adequate statement of the law to guide the jury's determination"; the court is not obliged to give the defendant's preferred version of the charge. See *United States v. Park*, 421 U.S. 658, 675 (1975). In this case, the district court's charge adequately informed the jury concerning the meaning of the intent element of the obstruction of justice offense, which requires the government to show that the defendant acted "corruptly" (18 U.S.C. 1503). As the court of appeals explained (Pet. App. 17a), "[t]he charge indicated that conviction required 'the improper motive or purpose of obstructing the due administration of justice' " and that "the statutory requirement of 'corrupt' intent could be found from 'knowledge or notice that [petitioner's] corrupt actions will obstruct justice which was then actually being administered.'" Hence, as the court of appeals further explained (*id.* at 18a (citation omitted)), "[b]ecause the instruction, taken as a whole, clearly in-

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met and the court of appeals reversed his conviction for obstructing a criminal investigation because the evidence did not show that he knew that the agent had been conducting a criminal investigation (see 470 F.2d at 1342). As described in the text above, however, the evidence in this case showed that petitioner knew of the grand jury's investigation and had been following its progress before he destroyed Paine Webber records.

formed the jury of the need to find an intentional obstruction of justice, the failure to use the precise words 'specific intent' in the charge was not error."<sup>4</sup>

### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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SEPTEMBER 1988

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<sup>4</sup> Petitioner mistakenly relies (Pet. 18) on the Second Circuit's earlier decision in *United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984), to support his contrary claim. The court of appeals in *Moon*, however, did not purport to consider the adequacy of the trial court's jury charge concerning the intent element of 18 U.S.C. 1503. In discussing the sufficiency of the evidence in that case, the court merely observed that Section 1503 requires a showing of specific intent (see 718 F.2d at 1236).



